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# FERNRITE SDN BHD

v.

# PERBADANAN NASIONAL BHD

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FEDERAL COURT, PUTRAJAYA
ARIFIN ZAKARIA CJ
HASHIM YUSOFF FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEAL NO: 02()-18-2011(W)]

C

31 OCTOBER 2011

***SECURITIES:*** *Shares - Sale and purchase of - Agreement - Beneficial ownership - Whether passed to purchaser upon delivery of shares when full purchase price not paid - Failure to make full purchase price -*

D *Whether defendant required to re-transfer shares to plaintiff - Whether defendant had no beneficial interest*

***CONTRACT:*** *Shares - Agreement - Claim to dividends - Whether defendant could claim for beneficial interest in dividends - Whether there*

E *was any agreement to extinguish plaintiff's rights to dividends - Release clause in Settlement Agreement - Whether sufficiently clear as to bar plaintiff from making claim to dividends*

***CONTRACT:*** *Construction - Agreements - Sale and purchase of shares - Beneficial ownership - Failure to make full purchase price - Whether*

F *defendant required to re-transfer shares to plaintiff - Whether defendant had no beneficial interest - Claim to dividends -Whether there was any agreement to extinguish plaintiff's rights to dividends - Release clause in Settlement Agreement - Whether sufficiently clear as to bar plaintiff from making claim to dividends*

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The plaintiff had agreed to sell to the defendant a certain amount of shares in Pernas International Holdings Berhad ("PIHB") ("the subject shares") by an agreement ("the Principal Agreement"). The subject shares were registered in the name of the defendant on the

H understanding that payment of the purchase price would be made on or before the agreed date. The defendant failed to make such payment. Thereafter, the parties entered into two supplemental agreements granting extensions to the defendant. Notwithstanding the extensions, the defendant still failed to meet its commitment

I to make payment. Subsequently, the parties entered into a Settlement Agreement whereby, *inter alia*, the defendant re-transferred the subject shares to the plaintiff. During the period of some five years, the PIHB dividends were paid to the

defendant, being the registered holder of the subject shares, amounting to RM100,527,735.12. Both the High Court and the Court of Appeal held that it was highly unconscionable on the part of the defendant to lay a claim on the dividends attached to the subject shares during the relevant period when the defendant had not at all paid for the subject shares. It was their concurrent findings that in the circumstances, equity would construct a trust in favour of the plaintiff as regards the dividends. The plaintiff as beneficial owner of the subject shares was therefore entitled to the said dividends. The defendant thus appealed. Leave to appeal was granted on the following questions (i) in a contract for the sale and purchase of shares, whether the beneficial ownership in shares passed to the purchaser upon delivery of the shares to and registration thereof in the name of the purchaser when the full purchase price had not been paid and (ii) in construing settlement agreements, where a claim was not expressly stipulated for by the party asserting that claim, whether a general release clause barred such a claim.

**Held (dismissing the appeal)**
**Per Arifin Zakaria CJ delivering the judgment of the court:**

**(1)** The transaction in the present case was a management buyout scheme, whereby the managers of a corporate entity purchased the subject shares in that entity. Also, by the terms of the Principal Agreement itself, the defendant was not free to deal with the subject shares and in the event the defendant failed to make payment of the full purchase price, the defendant may be required to re-transfer the subject shares to the plaintiff (cl. 11.2 of the Principal Agreement). Thus, it was evident that the subject shares were never intended to pass to the defendant, save upon payment of the full purchase price. (paras 23 & 26)

**(2)** It was the defendant's submission that cl. 9.1 (the release clause) of the Settlement Agreement was wide enough to cover any claim for dividends received by the defendant prior to the date of the Settlement Agreement. The focus of the Settlement Agreement was principally on the Purchase Price or/and Accrued Interest. The issue of dividends received by the defendant was not anywhere mentioned in the Settlement Agreement. In view of the finding that the defendant had no beneficial interest in the subject shares, therefore, the defendant could not likewise claim beneficial interest in the

dividends. Thus, any agreement to extinguish the plaintiff's rights to dividends ought, in the circumstances, to be expressed in clear and unequivocal terms in the Settlement Agreement : a general release clause would not be sufficient to extinguish such a right. The release clause in the present case was not sufficiently clear so as to bar the plaintiff from making a claim to the dividends. (para 28)

***Bahasa Malaysia*** *Translation Of Headnotes*

Plaintif telah bersetuju untuk menjual ke defendan sejumlah saham Pernas International Holdings Berhad ("PIHB") ("saham-saham berkenaan") melalui satu persetujuan ("Perjanjian Utama"). Saham-saham berkenaan didaftarkan di dalam nama defendan atas pemahaman bahawa pembayaran harga belian dibuat pada atau sebelum tarikh yang dipersetujui. Defendan gagal membuat bayaran sedemikian. Selepas itu, pihak-pihak terlibat telah memasuki dua lagi perjanjian tambahan membenarkan lanjutan masa kepada defendan. Walaupun lanjutan masa diberi, defendan masih gagal memenuhi komitmennya untuk membuat bayaran. Kemudiannya, pihak-pihak yang terlibat memasuki Perjanjian Penyelesaian di mana, antara lain, defendan memindah milik kembalikan saham-saham berkenaan kepada plaintif. Semasa tempoh lima tahun, dividen-dividen PIHB dibayar kepada defendan, sebagai pemegang berdaftar saham-saham berkenaan, berjumlah RM100,527,735.12. Kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan memutuskan bahawa ia amat tidak berpatutan bagi pihak defendan untuk menuntut dividen-dividen yang diperolehi terhadap saham-saham berkenaan semasa tempoh yang relevan kerana defendan tidak membuat apa-apa bayaran untuk saham-saham berkenaan. Ia adalah penemuan-penemuan sejajar mahkamah-mahkamah tersebut bahawa dalam keadaan itu, ekuiti membina satu amanah berpihak kepada plaintif berhubungan dividen-dividen. Plaintif sebagai pemilik benefisial saham-saham berkenaan berhak kepada dividen-dividen tersebut. Defendan oleh itu membuat rayuan. Kebenaran untuk merayu dibenarkan atas persoalan-persoalan berikut (i) dalam kontrak jual beli saham, sama ada hakmilik benefisial saham-saham berkenaan dipindahkan kepada pembeli atas penyampaian saham-saham kepada dan pendaftaran dalam nama pembeli apabila pembayaran penuh harga belian tidak dibayar dan (ii) dalam mentafsirkan perjanjian-perjanjian penyelesaian, di mana tuntutan tidak dengan nyata ditetapkan untuk pihak menegaskan tuntutan itu, sama ada klausa melepaskan umum melarang tuntutan sebegitu.

**Diputuskan (menolak rayuan)**
**Oleh Arifin Zakaria HB menyampaikan penghakiman mahkamah:**

**(1)** Transaksi di dalam kes ini adalah skim belian kuasaan pengurusan, di mana pengurus-pengurus entiti korporat membeli saham-saham berkenaan di dalam entiti itu. Juga, melalui syarat-syarat Perjanjian Utama sendiri, defendan tidak mempunyai kebebasan dalam pengendalian saham-saham berkenaan dan sekiranya defendan gagal membuat bayaran harga belian penuh, defendan mungkin diwajibkan memindah milik kembali saham-saham berkenaan kepada plaintif (kl. 11.2 Perjanjian Utama). Oleh itu, ia adalah terbukti bahawa saham-saham berkenaan tidak pernah dicadangkan untuk dipindahkan kepada defendan, kecuali atas pembayaran harga belian penuh.

**(2)** Ia adalah hujahan defendan bahawa kl. 9(1) (klausa melepaskan) Perjanjian Penyelesaian adalah cukup luas untuk meliputi apa-apa tuntutan dividen-dividen yang diterima oleh defendan sebelum tarikh Perjanjian Penyelesaian. Fokus Perjanjian Penyelesaian adalah terutamanya atas Harga Belian atau/dan Faedah Terakru. Isu dividen-dividen diterima oleh defendan tidak disebut di dalam Perjanjian Penyelesaian. Memandangkan penemuan defendan tidak mempunyai kepentingan benefisial ke atas saham-saham berkenaan, oleh itu, defendan tidak boleh menuntut kepentingan benefisial ke atas dividen-dividen. Oleh itu, apa-apa perjanjian untuk menghapuskan hak-hak plaintif ke atas dividen-dividen harus, dalam keadaan itu, dinyatakan dengan jelas dan terang syarat-syarat di dalam Perjanjian Penyelesaian : klausa melepaskan umum tidak mencukupi untuk menghapuskan hak sedemikian. Klausa melepaskan di dalam kes ini tidak cukup jelas sehingga boleh menghalang plaintif daripada membuat tuntutan kepada dividen-dividen.

**Case(s) referred to:**
*Agricultural Market Committee v. Shalimar Chemical Works Ltd [1997] 5 SCC 516* ***(refd)***
*Amfinance Bhd v. KT Steel Sdn Bhd & Ors [2008] 1 CLJ 290 HC* ***(refd)***
*Aqua Logistics Pte Ltd v. Sasacom Sdn Bhd [2008] 8 CLJ 405 HC* ***(refd)***
*Bank of Credit and Commerce International SA v. Ali [2002] 1 AC 251* ***(refd)***
*Eves v. Eves [1975] 3 All ER 768* ***(refd)***
*Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener) [2011] 3 CLJ 16 CA* ***(refd)***
*Grant v. John Grant & Sons Proprietary Limited [1954] 91 CLR 112* ***(refd)***

A *Lindo v. Lindo [1839] 1 Beav 496* ***(refd)***
*Lyall and Another v. Edwards And Matthie [1861] 6 H & N 337* ***(refd)***
*McEntire v. Crossley Bros Ltd [1895] AC 457* ***(refd)***
*Mostcash Plc & Others v. Fluor Limited [2002] EWCA Civ 975* ***(refd)***
*Ogg & Another v. Shuter [1875] LR 10 CP 159* ***(refd)***
B *Parway Estates Ltd v. Commissioners of Inland Revenue [1958] 45 TC 135* ***(dist)***
*Payler & Others v. Homersham [1815] 4 M & S 423* ***(refd)***
*Pemunya Kargo Atas Kapal 'Istana VI' v. Pemilik Kapal Atau Vesel 'Filma Satu' [2010] 1 LNS 804 HC* ***(refd)***
*Sanmaru Overseas Marketing Sdn Bhd & Anor v. PT Indofood Interna Corp*
C *& Ors [2009] 3 CLJ 10 CA* ***(refd)***
*The Directors Of The London And South Western Railway Company And George Clement v. Richard Doddridge Blackmore [1870] LR 4 HL 610* ***(refd)***
*Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*
D *[1996] AC 669 HL* ***(refd)***

**Legislation referred to:**
Sale of Goods Act 1957, ss. 19, 55(1)

*For the appellant - Porres Royan; M/s Shook Lin & Bok*
*For the respondent - Robert Lazar (TT Toi with him); M/s Shearn Delamore*
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*[Appeal from Court of Appeal; Civil Appeal No: W-02-1063-2007]*

*[Editor's note: For the Court of Appeal judgment, please see Fernrite Sdn Bhd v. Perbadanan Nasional Bhd [2011] 6 CLJ 1.]*

F *Reported by Suhainah Wahiduddin*

## JUDGMENT

G **Arifin Zakaria CJ:**

### Introduction

**[1]** This is an appeal by the appellant against the decision of the
H Court of Appeal dated 23 August 2010 dismissing the appellant's appeal. Leave to appeal was granted by this court on 22 February 2011 on the following questions:

Question 1

I > In a contract for the sale and purchase of shares, does the beneficial ownership in shares pass to the purchaser upon delivery of the shares to and registration thereof in the name of the purchaser when the full purchase price has not been paid?

Question 2

> In construing settlement agreements, where a claim is not expressly stipulated for by the party asserting that claim, does a general release clause bar such a claim?

In this judgment, the respondent will be referred to as the plaintiff and the appellant as the defendant, as in the trial court.

## The Facts

**[2]** The facts relevant to this appeal are briefly as follows:

> By an agreement dated 19 August 1996 ("the principal agreement") the plaintiff agreed to sell to the defendant 119,301,616 shares in Pernas International Holdings Berhad ("PIHB") ("the subject shares") at the agreed price of RM2.05 per share amounting to RM408,568,312.80 ("the purchase price").

**[3]** Pursuant to the principal agreement, the defendant provided the plaintiff with an Irrevocable Bank Guarantee for the purchase price. The defendant was required to pay the purchase price to the plaintiff on or before 16 October 1997. On 16 October 1996, the subject shares were registered in the name of the defendant on the understanding that payment of the purchase price would be made on or before the agreed date. The defendant failed to make such payment.

**[4]** On 14 October 1997, the parties entered into a supplemental agreement ("the 1st supplemental agreement") whereby the plaintiff granted the defendant an extension of one year to pay up, which expires on or before 16 October 1998. However, before the due date, the parties entered into another supplemental agreement dated 29 July 1999 ("the 2nd supplemental agreement").

**[5]** In the 2nd supplemental agreement, it was agreed as follows:

(i) the plaintiff granted the defendant yet another extension of one year, and the payment to be made on or before 16 October 1999;

(ii) the defendant made interest payment of RM19,882,815.31 to the plaintiff by reason of the defendant's failure to pay the purchase price; and

A (iii) parties agreed to open a sinking fund account in a bank or financial institution approved by the plaintiff in the joint names of the defendant and the plaintiff; and the purpose of the "sinking fund" was to utilize the monies in that account towards the payment of the purchase price and interest.

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**[6]** Notwithstanding the second extension, the defendant still failed to meet its commitment to make payment of the purchase price.

C **[7]** On 22 October 2001, the parties entered into a settlement agreement whereby:

(i) the sale and purchase of the subject shares was terminated;

(ii) the defendant re-transferred the subject shares to the plaintiff;

D (iii) the monies amounting to RM20,231,955.73 million in the sinking fund account were released to the plaintiff; and

(iv) all but one of the directors nominated by the defendant shall resign from the board of directors.

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**[8]** During the period of some five years from 16 October 1996 to 22 October 2001, even though the defendant did not pay for the subject shares, the subject shares were registered in the defendant's name. The company, PIHB was controlled and F managed by the defendant's representatives. This was because the sale was part of a 'management buy out'.

**[9]** Between 8 November 1996 to 16 January 2001, the PIHB dividends were paid to the defendant being the registered holder of the subject shares, amounting to RM100,527,735.12.

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## The High Court

**[10]** The plaintiff filed an originating summons in the Kuala Lumpur High Court against the defendant for the following reliefs:

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(i) A declaration that the subject shares which were, for the period August 1996 to 7 December 2001, registered in the name of the defendant, were held by the defendant on trust for and on behalf of the plaintiff by reason of the defendant's failure or inability to pay the full consideration for the subject shares;

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(ii) A declaration that any sums received by the defendant as dividends that was declared on the subject shares ought to have been held by the defendant as a constructive trustee for and on behalf of the plaintiff;

(iii) That an account be taken of all monies that had come into the hands of the defendant, and if the same were paid over by the defendant to any person or persons that an account of such payments be made by the defendant;

(iv) For an order that the defendant to pay over to the plaintiff such monies that have come into the defendant's hands by reason of the matters aforesaid;

(v)The cost of and occasioned by this application be paid by the defendant to the plaintiff; and

(vi) Further and/or any other relief that the court would deem fit and just to grant.

**[11]** At the end of the trial, the learned trial judge found for the plaintiff and held that:

> ... the registration of the subject shares in the Defendant's name merely confers legal ownership on the Defendant but not the beneficial interest which remained with the Plaintiff. Since the Defendant failed to pay as agreed in all the relevant agreements between the parties, the subject shares were held on trust by the Defendant for and an (s.i.c) on behalf of the Plaintiff. Therefore the dividend that accrued on the subject shares during the five (5) years period must be paid over to the Plaintiff.

## The Court Of Appeal

**[12]** On appeal, the Court of Appeal narrowed down the issue in the appeal to this:

> Given the above factual background, was the defendant holding the shares on constructive trust for the plaintiff so that the plaintiff has a claim in equity against the defendant in respect of the dividends received by the defendant?

**[13]** On this issue, the Court of Appeal held as follows:

> We find that in *Parway Estates Ltd*, *supra*, the distinguishable fact which is of critical importance is that the transfers were executed in consideration of the payment of the sum due under the agreement. In effect, that authority militates against the defendant herein. The defendant had never paid the purchase price to the

A plaintiff to support the transfer of the shares. Clearly, no equitable and beneficial interest in the shares can ever become vested in the defendant. If at all, only the legal ownership was vested in the defendant, and the defendant was holding the shares on constructive trust for the plaintiff. The defendant, being the plaintiff's constructive trustee, was in no position whatsoever to beneficially claim the dividends declared for the shares. In equity, the defendant was accountable to the plaintiff for the dividends.

**[14]** The Court of Appeal also asked this question:

C Would the retention of the dividends by the defendant, as purchaser of the shares, without paying the purchase price therefore, amount to unjust enrichment?

**[15]** On this issue, the Court of Appeal held as follows:

D The doctrine of unjust enrichment applies to the facts in the instant appeal, more specifically when the defendant has never paid the purchase price for the shares, in which case, the defendant is not entitled to retain the dividends declared for the shares. The plaintiff has proved that the defendant has been unjustly enriched at the plaintiff's expense. The plaintiff has the right to recover the E dividends from the defendant by way of restitution as it is unjust for the defendant to keep them. We therefore answer the above question in the affirmative.

**[16]** At the end of the hearing of the appeal, the Court of Appeal F dismissed the defendant's appeal with costs.

## The Issues Before This Court

**[17]** This court had on 22 February 2011 granted leave to the defendant to appeal against the decision of the Court of Appeal G on the questions of law set out earlier.

**[18]** The answer to the questions posed to us turns essentially on the construction to be given to the agreements entered between the parties starting with the principal agreement and H culminating with the settlement agreement. The main thrust of the defendant's case was that under cl. 5.1 of the principal agreement, the plaintiff was to deliver to the defendant the PIHB shares certificate together with the documents required to give good title "upon payment of the purchase price in accordance I with cl. 5.1(c)" of the principal agreement.

**[19]** What concerns us here is the dividends that were paid out to the defendant between 8 November 1996 to 16 January 2001, totalling RM100,527,735.12.

**[20]** The issue is whether the plaintiff is entitled to the dividends upon the termination of the agreement pursuant to the settlement agreement dated 22 October 2001. The answer to this depends on the terms of the various agreements between the parties. It is not in dispute that the sale of the subject shares to the defendant was part of "management buyout offer" by the defendant who was managing the hotels which formed the core business of PIHB. It is not an outright sale of shares. The subject shares were registered in the name of the defendant on a deferred payment basis against delivery of a bank guarantee. Looking at cls. 4.4 and 4.5 of the principal agreement, we are of the view that the bank guarantee was not intended to be treated as payment of the full purchase price for the subject shares. The full purchase price shall be paid by the defendant on or before the date falling 12 months from the completion date. Clause 4.5 of the principal agreement requires the defendant, on the completion date, to furnish to the plaintiff a bank guarantee for an amount equivalent to the full purchase price. The bank guarantee will be returned to the defendant upon payment of the full purchase price. Thus, it is amply clear that the bank guarantee cannot be treated as payment of the full purchase price as contended by learned counsel for the defendant. It is merely a form of security for payment of the full purchase price. Further, cls. 11.1 and 11.2 of the principal agreement provide that, in the event the defendant defaults in making full payment of the purchase price, the plaintiff is entitled to terminate the agreement and upon such termination, the defendant shall transfer the subject shares back to the plaintiff.

**[21]** As it turns out, no payment was made within the period stipulated in the principal agreement and in the two supplemental agreements. By the 2nd supplemental agreement, the date for payment was finally extended to 16 October 1999. But no payment was made and the principal agreement was eventually terminated pursuant to the settlement agreement dated 22 October 2001. Two important provisions in the settlement agreement were that:

(i) The subject shares were transferred back to the plaintiff; and

(ii) The monies in the sinking fund account amounting to RM20, 231,955.73 were released to the plaintiff.

**[22]** In this case, the defendant seeks to rely on the general principle as stated in *Parway Estates Ltd v. Commissioners of Inland Revenue* [1958] 45 TC 135, where Jenkins LJ stated, "once a

A contract for sale is executed, the subject - matter - the shares in the present case - becomes in equity the property of the purchaser". But in that case, the learned LJ did observe that "there is nothing in this agreement to take the case out of the general rule". Therefore, the learned LJ did anticipate that, B depending on the particular circumstances, a case may be taken out of that general principle. Is this present case one such case? We would have thought so. This is because from the general tenor of the agreement, it was never the intention of the parties that the beneficial interest in the subject shares was to pass to C the defendant upon the transfer of the subject shares to the defendant without the full payment of the purchase price. It is the term of the agreement that the full purchase price shall be paid on or before the date falling twelve (12) months from the completion date. Unless and until that payment is made, we do D not think, it is the intention of parties that the beneficial interest in the subject shares were to pass to the defendant, bearing in mind that the defendant has not made any payment towards the purchase price of the subject shares. In *Parway Estates Ltd (supra)*, the obligations were on the vendors to perform before they could E call upon the purchaser to pay the purchase money. Therefore, on the facts, *Parway Estates Ltd (supra)* is clearly distinguishable from the present case.

**[23]** From the principal agreement, it would appear that the F defendant was given the right to manage the PIHB prior to payment of the purchase price of the subject shares. The transaction in the present case, as we understand it, is a management buyout scheme, whereby the managers of a corporate entity buy the subject shares in that entity. (See plaintiff's second G affidavit). It is also to be noted that by the terms of the principal agreement itself, the defendant was not free to deal with the subject shares and in the event the defendant failed to make payment of the full purchase price, the defendant may be required to re-transfer the subject shares to the plaintiff (See cl. 11.2 of H the principal agreement).

**[24]** On those factual matrix, both the High Court and the Court of Appeal held it is highly unconscionable on the part of the defendant to lay a claim on the dividends attached to the subject shares during the relevant period when the defendant had not at I all paid for the subject shares. It is their concurrent findings that in the circumstances, equity would construct a trust in favour of the plaintiff as regards the dividends. The plaintiff as beneficial

owner of the subject shares is therefore entitled to the said dividends. *Eves v. Eves* [1975] 3 All ER 768; *Sanmaru Overseas Marketing Sdn Bhd & Anor v. PT Indofood Interna Corp & Ors* [2009] 3 CLJ 10; *Ezzen Heights Sdn Bhd v. Ikhlas Abadi Sdn Bhd; Soo Yuh Mian (Intervener)* [2011] 3 CLJ 16; and *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 HL were cited in support of their decision. Having considered all the relevant facts and circumstances in this case, we are of the view that both the courts below had come to a correct finding.

**[25]** Learned counsel for the defendant further contended that cl. 5.1(c) stipulates that the defendant is to deliver to the plaintiff "an irrevocable bank guarantee for the amount equal to the full purchase price", therefore, upon furnishing the bank guarantee to the plaintiff, the transaction was completed and the plaintiff was to transfer the subject shares to the defendant. With that transfer, learned counsel maintained that both the legal and the beneficial interest in the subject shares passed to the defendant, and the relationship between the defendant and the plaintiff became that of creditor and debtor. Hence, the plaintiff is only entitled to the purchase price of the subject shares, and in the event of default by the defendant, the only remedy open to the plaintiff is to claim for the same. Learned counsel relied on s. 55 of the Sale of Goods Act 1957 (Revised 1989)("the Act") in support of his contention. Section 55(1) of the Act reads:

> 55. Suit for price.
>
> (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

It is not in dispute that under the Act, "shares" come within the definition of the word "goods". But for s. 55(1) of the Act to apply, we have to be satisfied that the property in the goods has passed to the purchaser pursuant to the contract. To determine whether the property in the goods has passed to the purchaser, regard must be had to s. 19 of the Act, which reads:

> 19. Property passes when intended to pass.
>
> (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

A (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. (emphasis added)

B This section is a codification of the common law principle as enunciated in *Ogg & Another v. Shuter* [1875] LR 10 CP 159. In that case, Lord Coleridge CJ observed, "The rule as deducible from all the cases, and as it is laid down in the learned works of Mr Justice Blackburn and Mr Benjamin on sale, is, that the question whether the property has passed being one of intention C to be collected from all the circumstances, no single circumstance is necessarily conclusive in all cases, but the conclusion to be drawn must depend on a balance of the various circumstances on one side and the other". (See also *McEntire v. Crossley Bros Ltd* [1895] AC 457 and *Agricultural Market Committee v. Shalimar* D *Chemical Works Ltd* [1997] 5 SCC 516). Section 19 of the Act was applied in our court in a number of cases (See *Pemunya Kargo atas Kapal 'Istana VI' v. Pemilik Kapal atau Vesel 'Filma Satu'* [2010] 1 LNS 804; *Amfinance Bhd v. KT Steel Sdn Bhd & Ors* [2008] 1 CLJ 290; and *Aqua Logistics Pte Ltd v. Sasacom Sdn Bhd* E [2008] 8 CLJ 405).

**[26]** In the present case, based on what we have alluded to earlier, it is evident that the subject shares were never intended to pass to the defendant, save upon payment of the full purchase F price. Therefore, we are of the view that s. 55(1) of the Act could not apply to this case.

**[27]** The second question posed to us is whether the plaintiff is precluded by the settlement agreement from bringing a claim G against the defendant for the dividends paid prior to the settlement agreement. Much reliance was placed on cls. 3.3 and 9.1 of the settlement agreement which read:

3.3. The parties hereto further agree that upon the completion of the matters set forth in Clause 3.2(a) to (d), neither parties H shall have any further rights or claims against the other and in particular, the Total Outstanding shall for all intents and purposes be deemed repaid to PNS upon completion of the matters set forth in Clause 3.2, and PNS shall have no further claim against Fernrite in respect of the Purchase Price I or Accrued Interest.

...

> 9.1. Upon completion of this Agreement, in particular, upon completion of the matters set out under Clause 3.2 above, the parties hereto agree that neither party shall have any further action or claim against the other in respect of any matter arising out of this Agreement or the Principal Agreements.

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It is the defendant's submission that cl. 9.1 (the release clause) of the settlement agreement is wide enough to cover any claim for dividends received by the defendant prior to the date of the settlement agreement. It is common ground that a sum of RM100,527,735.12 was received by the defendant as dividends in respect of the subject shares. And during the currency of the agreements the defendant had made a total payment of RM60,042,095.99, made up of:

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(i) RM39,711,305.98 payment of overdue interests; and

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(ii) RM20,330,790.01 being part of the dividends payment paid out of the sinking fund account.

**[28]** In law, no particular form or word is necessary to constitute a valid release, and any words which show an evident intention to renounce a claim or discharge the obligation are sufficient. And the normal rules relating to the construction of a written contract apply equally to a release, and so a release in general term is to be construed according to the particular purpose for which it was made. (*Bank of Credit and Commerce International SA v. Ali* [2002] 1 AC 251)

E F

In cl. 3.3 of the settlement agreement, particular reference is made to the "total outstanding" and to "purchase price" or "accrued interest". The words "total outstanding" are in turn defined as "... the aggregate of the purchase price and the accrued interest amounting to Ringgit Malaysia Five Hundred and Eighty Eight Million Two Hundred and Twenty Seven Thousand, One Hundred and Fifteen and Sen Twenty Five (RM588,227,115.25) only". Therefore, the focus of the settlement agreement was principally on the purchase price or/and accrued interest. The issue of dividends received by the defendant during the pendency of the agreement was not anywhere mentioned in the settlement agreement. Clause 5.1 of the settlement agreement encompasses the right to dividends subsequent to the settlement agreement. It was contended for the defendant that since the settlement agreement was silent on the issue of past dividends, therefore, it was the intention of the parties to allow the defendant to keep

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A the dividends received prior to the date of the settlement agreement. However, in view of our finding that the defendant has no beneficial interest in the subject shares, therefore, it necessarily follows that, the defendant could not likewise claim beneficial interest in the dividends. Thus, any agreement to extinguish the
B plaintiff's right to the dividends ought, in the circumstances, to be expressed in clear and unequivocal terms in the settlement agreement: a general release clause as in the present case in our opinion, would not be sufficient to extinguish such a right. In *The Directors, & C, of the London and South Western Railway Company*
C *and George Clement v. Richard Doddridge Blackmore* [1870] LR 4 HL 610, it was observed that, "The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged, or a question
D which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release." per Lord Westbury. (See also *Mostcash Plc & Others v. Fluor Limited* [2002] EWCA Civ 975; *Grant v. John Grant & Sons Proprietary Limited* [1954] 91 CLR 112; *Lyall and Another v. Edwards And*
E *Matthie* [1861] 6 H & N 337; *Lindo v. Lindo* [1839] 1 Beav 496; and *Payler & Others v. Homersham* [1815] 4 M & S 423 [105 ER 890]). For these reasons, our answer to the second question would be that the release clause in the present case is not sufficiently clear so as to bar the plaintiff from making a claim to
F the dividends.

**[29]** The Court of Appeal further found in favour of the plaintiff on the principle of unjust enrichment. The Court of Appeal opined that the defendant would be unjustly enriched if it was allowed to
G retain the dividends which were derived from the subject shares when the defendant has never paid the purchase price for those shares. Before us, learned counsel for the defendant argued that the principle of unjust enrichment has no application to the present case. In view of our earlier findings, we do not think it is
H necessary for us to consider this issue.

**[30]** For the reasons stated above, we accordingly dismiss the appeal by the defendant with costs. We will now invite counsel to address us on the issue of costs.

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